No. 75-960

In the Supreme Court of the United States

OCTOBER TERM, 1975

ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

STATE OF MARYLAND, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the Environmental Protection Agency, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-37a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1975 (App. B, *infra*, 38a-40a). By

order of December 11, 1975, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, upon a State's failure to adopt an implementation plan meeting the requirements of the Clean Air Act, the EPA Administrator has authority under the Act to require the State to inspect motor vehicles to assure that they are properly maintained to control airborne pollutants within the State.

2. Whether, if the EPA Administrator has such statutory authority, the Clean Air Act is in this respect a valid exercise of Congress' power under the Commerce Clause of the Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The pertinent provisions and regulations are set forth in Appendix C, *infra*, 41a-65a.

STATEMENT

A. The Statutory Scheme

The relevant provisions of the Clean Air Act are summarized at pages 3-8 of our petition for a writ of certiorari in *Environmental Protection Agency* v. *Brown*, No. 75-909, which presents the same issues as this case. (We are serving a copy of our petition in that case upon respondents here.)

Briefly, the Act requires the Administrator to promulgate standards for maximum concentrations of particular pollutants in the air (Section 109). The States must then develop plans to achieve and maintain these standards within each air quality control region in the State (Section 110(a)(1)). The Administrator reviews these state implementation plans for conformity to the statutory standards designed to assure that they provide for effective enforcement of the standards (Section 110(a)(2)). If the Administrator finds an implementation plan inadequate, he must promulgate an appropriate plan for the State (Section 110(c)). When the Administrator finds "any person"[1] in violation of any implementation plan, Section 113 of the Act authorizes him to undertake enforcement measures, including application to an appropriate district court for a temporary or permanent injunction.

B. The Maryland Transportation Control Plan

On January 28, 1972, the State of Maryland submitted its implementation plan for achieving and maintaining the national ambient air quality standards. 37 Fed. Reg. 10870. It did not include transportation control measures since the State had been advised by the Administrator that adoption of such measures could be deferred until February 15, 1973. 37 Fed. Reg. 10844, 10871. On May 31, 1972, the

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[1] "Person" is defined in Section 302(e) to include a "State, municipality, and political subdivision of a State".

Administrator found the plan inadequate in several respects (37 Fed. Reg. 10871). While development of a revised plan was being negotiated, the United States Court of Appeals for the District of Columbia Circuit held that the Administrator had improperly permitted postponement of submission of the transportation control portions of state implementation plans beyond the statutory deadline of January 30, 1972. *National Resources Defense Council* v. *Environmental Protection Agency*, 475 F.2d 968. The court ordered the Administrator to rescind all previously granted extensions for the submission and implementation of transportation control measures and to require the States to submit appropriate measures by April 15, 1973. The court directed the Administrator to prepare and publish a plan as required by the Act if a State failed to submit such measures. 475 F.2d at 970-971.

On March 20, 1973, the Administrator notified the States of the requirement to submit transportation control measures. 38 Fed. Reg. 7323. The State of Maryland submitted a transportation control plan to EPA on April 16, 1973, which the Administrator disapproved on June 22, 1973. 38 Fed. Reg. 16558-16559, 16565, 16566. Following the procedures required by the Act, the Administrator signed a substitute transportation control plan for Maryland on November 30, 1973 (38 Fed. Reg. 34240).

The Administrator's plan included specific requirements applicable to the various Maryland air quality control regions and general requirements applicable

throughout the State.[2] One basic requirement was that the State "establish an inspection and maintenance program applicable to all light duty, medium duty, and heavy duty vehicles" registered in the Baltimore area and operating on state-owned streets and highways (40 C.F.R. 52.1095(c); App. C, *infra*, 62a). The State was required to submit "a detailed compliance schedule showing the steps it will take to establish and enforce" the inspection and maintenance program, including the text of needed statutory proposals and regulations, and a "signed statement from the Governor or his designee identifying the sources and amount of funds for the program" (40 C.F.R. 52.1095(f) and (f)(4); App. C, *infra*, 64a-65a).

The State did not submit the required schedules; instead, it petitioned the court of appeals for review of the Administrator's action pursuant to Section 307(b)(1) of the Act, 42 U.S.C. 1857h-5(b)(1).

C. The Decision Below

The court of appeals noted that the contention that the Act permits the Administrator to compel the States to implement EPA promulgated regulations raises an issue of "unusual constitutional significance" (App. A, *infra*, 23a), and that the constitutional validity of the Administrator's efforts to compel such state action "is very doubtful at the very best" (App. A, *infra*, 27a). In order to avoid reach-

[2] These requirements are summarized in the opinion below (App. A, *infra*, 33a-34a). Some of them have subsequently been revoked or suspended (App. A, *infra*, 8a-9a).

ing the constitutional issue, the court decided the case on statutory grounds (App. A, *infra*, 27a-28a). It concluded that although Section 110 of the Act authorizes the Administrator to prepare a substitute control plan for the State to consider, the Act

> does not empower him to direct a state to enact its own statutes and regulations as prescribed by the Administrator. In our opinion, the preparation of regulations for a state means regulations to be applied within the boundaries of a state if it does not act in a manner approved by the EPA. * * *
>
> * * * * *
>
> Has Congress abandoned its time honored and constitutionally approved device of threat and promise? We think not. The statute here tells the States to devise implementation plans conforming to federal specifications or else the EPA will promulgate its own plan. The threat is a federally imposed regulation with federal administration; the promise is the invitation for Maryland to enact a suitable implementation plan and administer it with state employees, thus avoiding federal interference. [App. A, *infra*, 29a, 31a.] [3]

[3] The court also struck down the employer incentive regulation, 40 C.F.R. 52.1105, for vagueness and failure to give adequate notice to the affected parties (App. A, *infra*, 11a-18a); it also remanded the vapor recovery regulation, 40 C.F.R. 52.1102, for clarification (App. A, *infra*, 19a-21a). We do not seek review of these portions of the decision.

REASONS FOR GRANTING THE WRIT

This case, like *Environmental Protection Agency* v. *Brown*, petition for a writ of certiorari pending, No. 75-909, and *District of Columbia* v. *Train*, 521 F.2d 971 (C.A.D.C.), concerns the extent of the EPA Administrator's authority to promulgate pollution control plans for transportation systems regulated by the States, and to require the States to carry out such plans.[4] The decision below limits that authority in the same way as the decision of the Ninth Circuit in *Brown*, and is thus in direct conflict with *Pennsylvania* v. *Environmental Protection Agency*, 500 F.2d 246 (C.A. 3). Moreover, as we pointed out in our petition in *Brown*, it is substantially inconsistent with the decision in *District of Columbia* v. *Train*.

The same statutory provisions are involved in each case; the considerations that bear upon their interpretation and constitutionality are accordingly identical. Therefore, as we explained in our *Brown* petition, the existence of the conflict in the circuits concerning the Administrator's authority to implement an important federal program, and the significant constitutional issues concerning the relation between state and federal powers which underlie that conflict, merit plenary review by this Court.

[4] The Solicitor General has authorized the filing of a petition for certiorari in *District of Columbia* v. *Train*.

CONCLUSION

For the reasons set forth in the petition for a writ of certiorari in *Environmental Protection Agency* v. *Brown*, *supra*, the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.

PETER R. TAFT,
Assistant Attorney General.

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ROBERT V. ZENER,
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JANUARY 1976.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 74-1007

STATE OF MARYLAND, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

No. 74-1026

SAFEWAY STORES, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

No. 74-1037

SEARS, ROEBUCK & COMPANY, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

No. 74-1062

GENERAL MOTORS CORPORATION, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

No. 74-1063

THE MAY DEPARTMENT STORES COMPANY
MONTGOMERY-WARD & CO., INC., and
J. C. PENNEY COMPANY, INC., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

No. 74-1064

BETHELEM STEEL CORPORATION, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

On petition for review of orders and regulations of the EPA.

Argued: December 17th, 1974 Decided: Sept. 19, 1975

Before WIDENER, Circuit Judge, and MACKENZIE and WARRINER, District Judges.*

Martin A. Ferris, III, Special Assistant Attorney General of Maryland (Francis B. Burch, Attorney General of Maryland, on brief) for Petitioner in No. 74-1007; William H. King, Jr., and William F. Patten (McGuire, Woods and Battle on brief) for Petitioner in No. 74-1026; William F. Patten (Harvey H. Holland, Jr.; Benjamin Cabell, IV; Wilkes and Artis; Robert A. Maxwell and Robert A. DiFilippo on brief) for Petitioner in No. 74-1037; William Gar Richlin (Roger D. Redden, Frazer F. Hilder and Raymond T. Murphy on brief) for Petitioner in No. 74-1062; David J. Toomey and Leonard E. Santos (Michael W. Smith; Christian, Barton, Parker, Epps and Brent; Frank E. Morris; Joseph J. C. Ranalli; Terrence MacLaren; Pennie and Edmonds; John J. Ross; Peter W. Tredick; Hogan and Hartson; Allan D. Shafter; Barbara E. Schur; Alan S. Langer and

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* United States District Judges for the Eastern District of Virginia; sitting by designation.

Mark Curran on brief) for Petitioners in No. 74-1063; Alan D. Yarbro (Anthony M. Carey; John G. Lamb, Jr.; and Venable, Baetjer and Howard on brief) for Petitioner in No. 74-1064; John E. Bonine, Attorney, Environmental Protection Agency, and Bruce J. Chasan, Attorney, United States Department of Justice, (Wallace H. Johnson, Assistant Attorney General, Edmund B. Clark, Attorney, United States Department of Justice, Alan G. Kirk, II, Assistant Administrator for Enforcement and General Counsel, and William F. Pedersen, Attorney, Environmental Protection Agency, on brief) for Respondent in Nos. 74-1007, 74-1026, 74-1037, 74-1062, 74-1063 and 74-1064.

WIDENER, Circuit Judge:

This is a consolidated petition for review under 42 USC § 1857h-5(b)(1)[1] of certain regulations of the Environmental Protection Agency (EPA) promulgated under the authority of 42 USC § 1857c-5(c)[2]

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[1] Section 1857h-5(b)(1) provides in relevant part:

> A petition for review of action of the Administrator . . . in approving or promulgating any implementation plan under section 1857c-5 of this title . . . may be filed only in the United States Court of Appeals for the appropriate circuit.

[2] It is provided in § 1857c-5(c) that:

> (1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish

and 42 USC § 1857g[3] and affecting the area known as the Metropolitan Baltimore Intrastate Air Quality Control Region. Although not all of the petitioners challenged the same regulations for the same reasons, there was sufficient similarity in their claims to consolidate the petitions and hear argument together.

The specific regulations challenged by the private petitioners[4] are:

> Employer's Provision for Mass Transit Priority Incentives—40 CFR § 52.1105;
>
> Management of Parking Supply—40 CFR § 52.1111;
>
> Control and Prohibition of Sources of Photochemically Reactive Organic Materials—40 CFR § 52.1112; and

---

> proposed regulations setting forth an implementation plan, or portion thereof, for a State if—
>
> * * * *
>
> (B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section.

[3] 42 USC § 1857g states:

> (a) The Administrator is authorized to prescribe such regulations as are necessary to carry out his function under this chapter. . . .

[4] The private parties originally joined in this action are Sears Roebuck & Co., General Motors Corp., Montgomery Ward & Co., Inc., J. C. Penny Co., Inc., May Dept. Stores Co., Adcor Realty Corp., Texaco, Gulf, Safeway Stores, and Bethlehem Steel Corp. The Texaco and Gulf cases have been deferred by agreement. Adcor Realty Corp., and Associated Dry Goods Corp., have dismissed their petitions without prejudice.

Control of Evaporative Losses from Vehicular Tanks—40 CFR § 52.1102.

The State of Maryland challenges the right of, as well as the justification for, the EPA to require that it enact programs calling for retrofit of pollution control devices on certain classes of vehicles and the establishment of bikeways. 40 CFR §§ 52.1095-52. 1100, 52-1106. Maryland has also called for a complete reevaluation of the Baltimore Transportation Plan.

The Clean Air Act, as amended, 42 USC § 1857 et seq, provides that the Administrator of the EPA shall publish national standards for air quality as to those pollutants which have been determined by EPA, based on the latest scientific data, to be harmful to the public health or welfare. 42 USC §§ 1857c-3, 1857c-4. For each pollutant, a primary standard is to be established to protect the public health and a secondary standard to protect the public welfare. On April 30, 1971, the EPA promulgated such regulations for sulfur oxides, particulate matter, carbon monoxide, photochemical oxidants, hydrocarbons, and nitrogen dioxide. 40 CFR §§ 40.4-50.11 (April 30, 1971).

The statute provides that the states shall have the primary responsibility for achieving and maintaining these air quality standards. 42 USC § 1857c-2. Each state was given the opportunity to submit to the EPA, not later than January 1, 1972 (nine months after the promulgation of the standards), implementation plans which would achieve the pri-

mary standards within three years and the secondary standards within a specified reasonable time. 42 USC §§ 1857c-5(a)(1), 1857c-5(a)(2)(A). Such plans were to include, among other requirements, "emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary and secondary standard, including but not limited to, land-use and transportation controls." 42 USC §§ 1857c-5(a)(2)(B). On application by the governor of a state, the EPA may grant an extension of time, not to exceed two years, within which to achieve the primary standard, provided the state has shown that it is unable to meet the standard with available or alternative technology. 42 USC § 1857c-5(e). After review of a state's plan, the EPA may accept it, or reject it and issue its own implementation plan for the area. 42 USC § 1857c-5(c)(1).

Maryland submitted its regional plan on January 28, 1972. On May 31, 1972, the EPA also permitted several states, including Maryland, until February 15, 1973 to amend their implementation plans. 37 Fed. Reg. at 10844. In addition, the EPA granted Maryland an extension of two years in its attainment dates for the national carbon monoxide standards. 37 Fed. Reg. 10871.

Subsequently, the United States Court of Appeals for the District of Columbia, in *Natural Resources Defense Fund* v. *EPA*, 475 F2d 968 (D.C. Cir. 1973), held that a blanket delay in the submission of plans

or a similar blanket extension of achievement dates was not permitted. Based on that decision, the EPA notified Maryland that its extension was canceled and that complete plans were to be filed by April 15, 1973. 38 Fed. Reg. 7323 (March 20, 1973).

Maryland then filed its plan on April 16, 1973, along with a request for a two-year extension. The EPA denied the extension and disapproved portions of Maryland's April 16th plan on June 15, 1973. 38 Fed. Reg. 16558-16559, 16565-16566 (June 22, 1973). On August 2, 1973, the EPA published proposed regulations to supplement the Maryland plan. 38 Fed. Reg. 20769-20779 (August 2, 1973). Following public hearings held in Baltimore on September 5, 1973, the EPA promulgated the balance of the regulations in issue here. 38 Fed. Reg. 34230-34257 (December 12, 1973). These included provisions which provided that the "state of Maryland shall" establish automobile inspection and maintenance programs as well as retrofit programs. Taken in view of the preamble published at 38 Fed. Reg. 30626 (November 6, 1973), the EPA obviously took the position that these regulations constituted a comprehensive plan for implementation of the Clean Air Act in the Baltimore area, and would produce reductions in pollutants sufficient to meet national standards by 1977. 38 Fed. Reg. 34240 (December 12, 1973).

Thereafter, in June of 1974, Congress froze the standards for light duty vehicles and engines manufactured during the model years 1975 and 1976. P.L. 93-319(5)(a). The EPA itself revoked 40 CFR

§ 52.1112, styled the control and prohibition of sources of photochemically reactive organic material. 40 Fed. Reg. 5523 (February 6, 1975). It also suspended indefinitely 40 CFR § 52.1111 providing for the management of parking supply. 40 Fed. Reg. 2586 (January 14, 1975, pending amendment), 40 Fed. Reg. 29713 (July 15, 1975, without qualification pending Congressional action). In addition, the EPA has advised by letter dated March 25, 1975 that it is rescinding 40 CFR § 52.1097, the oxidizing catalyst retrofit program for medium and light duty vehicles. Finally, the EPA has taken the position that an indefinite suspension of any regulation entitled an aggrieved person, before reimposition of that regulation, to ask for review upon the same terms as were originally available.

I

Standard of Review

In reviewing an implementation plan under the Clean Air Act, the reviewing court must apply substantially the same standards imposed by the Administrative Procedure Act. See *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 413-14 (1970). The authority to make such regulations must be found in the statute, the procedures followed must be lawful, and the plan must be constitutional. If these requirements are met, the challenged regulations may be set aside only where they are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 USC 706(2)(A). Accord *Union Electric Co.* v. *EPA*, 515 F2d

206, 214 (8th Cir. 1975) and authorities cited therein. In arriving at such a determination, the court must: " 'engage in substantial inquiry' into the reasonableness of the agency action . . . and as a part of that inquiry' it 'must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment' . . . since 'it is' 'arbitrary or capricious' for an agency not to take into account all relevant factors in making its determination." *Appalachian Power Co.* v. *EPA*, 477 F2d 495, 507 (4th Cir. 1973), (citations omitted). And, under *Appalachian Power*, which sets out the standard of review in this circuit, the courts must not substitute their judgment for that of the agency which Congress has entrusted with the responsibility of weighing the many competing factors. Accord *Ethyl Corp.* v. *EPA* —— F2d ——, (D.C. Cir., No. 73-2205, 1975). Nevertheless, the record must indicate that all such factors were weighed by the agency, and must support the decision which was reached.

Numerous objections to the Agency's plan have been raised in these consolidated actions. They call into question the procedural aspects of the EPA's rulemaking, the constitutionality of its regulations, and their rationality. While we find some parts of the regulations to be contrary to law, in view of the disposition we make of the case, we do not reach the many constitutional issues raised or most of the multitude of procedural questions posed by the parties.

II

Employers Provision for Mass Transit Priority Incentives, 40 CFR 52.1105 (EMTI)

A

40 CFR § 52.1105 requires each employer within the region who maintains more than 700 employee parking spaces (to be later reduced so as to apply to those maintaining more than 70 such spaces) to submit to the EPA a plan for encouraging employees to use mass transit facilities rather than single passenger automobiles. The only criteria governing the acceptability of such a plan is that:

> ". . . the Administrator shall approve such program for each employer *if he finds it to be adequate*, and shall disapprove it *if he finds it not to be adequate*." 40 CFR § 52.1105(c) (emphasis added).

We note complete absence of any established relevant factors which the Administrator considers in approving or disapproving an implementation plan. So without any stated criteria, the EPA has unlimited discretion in deciding which plan will or which will not be approved, and, of equal significance, the employer is given no guidance whatsoever as to how he might draft an acceptable plan other than he must "encourage the use of mass transit" and "discourage the use of single passenger automobiles" by his employees. While several suggested restrictive meas-

ures are set forth in the regulation,[5] an employer's ingenuity and know-how in implementing the regulation faces an impossible task, for the regulation does not advise him of a goal to be attained or of the factors to be considered by the Administrator in determining whether a particular program is "adequate."

The EPA has admitted in its brief that it is practically impossible for an employer to ascertain what will constitute an acceptable plan. According to the EPA:

> "[t]he appropriate measures in any given instance will depend upon the location of the employer and the employees, the availability of mass transit, traffic patterns, and many other factors. These matters can be judged only on an *ad hoc* basis. It may be that one transit incentive plan providing for a ten percent reduction in VMT will be disapproved because a twenty percent reduction is feasible, while another transit incentive plan providing for a five percent reduction in VMT will be approved because it is the most feasible plan under the circumstances." EPA brief at 33.

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[5] Section 52.1105 suggests that the program may be adequate if it contains "provisions for subsidies to employees who use mass transit, reductions in the number of employee parking spaces, or surcharges on the use of such spaces by employees, provision of special charter buses or other modes of mass transit, preferential parking and other benefits to employees who travel to work by carpool *and/or any other measures acceptable to the* Administrator." (Italics added)

While the EPA brief attempts to cure the regulation by suggesting some factors the Administrator should consider in his *ad hoc* determination of adequacy, the regulation itself suggests none. It has recently been held in a similar case that such vagueness invalidated a parking regulation imposed under the Clean Air Act. In *South Terminal Corp.* v. *EPA*, 504 F2d 646 (1st Cir. 1974), the court stated:

> "We are concerned, however, by the standardlessness of subsection (d). The clause permits denial of a permit unless the functionary passing on such requests decides that the facility 'will not interefere with the attainment or maintenance of applicable Federal Air Quality Standards. . . .' * * * The regulation does not indicate how 'interference' is to be judged, nor does it state who must bear the burden of showing non-interference. The prospective applicant for a permit is utterly without guidance as to what he must prove, and how. And the standard is so vague that it invites arbitrary and unequal application.
>
> . . . . We disapprove the 'interference' clause as now worded." 504 F2d at 670.

We are of the opinion that the regulation in question, 40 CFR § 52.1105, is likewise impermissibly vague. It states neither a goal to be attained, nor a standard to be applied, nor factors to be used by the Administrator in his determination as to adequacy. An employer may read the regulation in vain for guidance as to what his mass transit program

should contain in order to receive administrative approval.

Common sense dictates that if the same number of people are transported to and from their work by fewer motor vehicles, there will be fewer pollutants discharged into the atmosphere and the laudable purpose of clean air will be served. But the employer, and in many instances the employees, who must bear the brunt of the reduced vehicular traffic, must be given some reasonable direction as to what is demanded of them by the government. Moreover, this court, before it can make an intelligent determination as to whether the Administrator's action is arbitrary or capricious, must know what the relevant factors are that are to be considered in approving or disapproving such programs. Accord *Union Electric Co.* v. *EPA*, 515 F2d 206 (8th Cir. 1975).

We do not suggest a solution, but only decide the case before us. Nothing in the record indicates the EPA faces an impossible task in framing a regulation of sufficient specificity.

B

Neither the Maryland plan submitted on April 16, 1973 nor the EPA's proposed rulemaking promulgated on August 2, 1973 made any mention of a program which resembles the Employers Mass Transit Program set out in 40 CFR § 52.1105. While the proposed rulemaking mentioned limitations upon on-street parking, as well as upon construction of additional spaces, the only thing the EPA can point to

to show the Employers Mass Transit Incentive Program should have been expected in the Baltimore region is that on the same day the EPA proposed a measure entitled "Reduction of Employee Parking" for the National Capital Interstate Air Quality Control Region. 38 Fed. Reg. 20787, § 52.1096 (August 2, 1973). Yet, the regulation here under review did not appear in the Baltimore plan until published in final form on December 12, 1973. It was only then that the EPA offered to receive comments and limited their receipt to those filed prior to January 14, 1974.

Clearly, the promulgation of implementation plans under the Clean Air Act by the EPA is "rulemaking."[6] *Buckeye Power Inc.* v. *EPA*, 481 F2d 162, 170-71 (6th Cir. 1973); *Wallapoint Oysters, Inc.* v. *Ewing*, 174 F2d 676, 693 (9th Cir. 1949), cert. den., 338 US 860 (1949). The Administrative Procedure Act requires notice be given to proposed rulemaking and specifies that it include "either the terms or substance of the proposed rule or a description of the subject and issues involved." 5 USC § 553(b)(3). The Clean Air Act itself requires the EPA to consider any State hearing or record and "publish pro-

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[6] The Administrative Procedure Act defines rulemaking as the "agency process for formulating, amending, or repealing a rule." 5 USC § 551(5). A "rule" is defined as:

> [T]he whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy. . . . 5 USC § 551(4).

posed regulations setting forth an implementation plan . . . for a State. . . ." 42 USC § 1857c-5(c)(1).

The petitioners argue that at no time prior to December 12, 1973 were they given notice that employer mass transit incentive provisions were being considered, and that, as a result, they have been denied a reasonable opportunity to evaluate and consider these measures. They argue that the Agency's willingness to accept post-promulgation comments after the fact from interested parties is evidence of the confusion attendant to the adoption of certain of the strategies included in the plan and illustrates a lack of prior information. We agree.

The need for adequate hearing proceedings was emphasized by this court in *Appalachian Power Co.* v. *EPA*, 477 F2d 495 (4th Cir. 1973). In that case, we were reviewing the EPA's approval of a state pollution control program. We held that the EPA need not conduct hearings prior to its decision if the state hearings were adequate and the EPA properly considered their findings. As we stated:

> "This conclusion [that no EPA hearing is required] . . . is based on the assumption that at the state hearing interested parties were afforded full opportunity to present their contentions with respect to the regulations and their drastic impact, such opportunity might well include the right to more than merely the opportunity to comment. [Citation omitted] What is required in all instances, whatever the character of the administrative action, is 'the reality of an opportunity to submit an effective presentation,' and,

> if in the context of the issues involved, 'cross examination on the crucial issues' is found proper, such right should be recognized and upheld." 477 F2d 495, 503.

At the hearing on September 5, 1973, no one discussed the Employers Mass Transit Incentive Program. This adds weight to the petitioners' contention that they were denied "an opportunity to participate in the rulemaking." 5 USC § 553(c). In *South Terminal*, the notice mentioned reducing off-street parking, and during the subsequent hearing there was discussion of "reducing parking facilities where plants . . . [could] be served by mass transit." 504 F2d at 659. Here, however, the notice did not mention off-street parking, and at the hearing there was no discussion of reducing employee parking spaces. Since the disputed regulations were not subject to hearings at a state level, were not a part of the proposed regulations that were subject to comment, and were not mentioned prior to December 12, 1973 when they were issued in final form, it is clear that the intensive pre-promulgation inquiry anticipated by *Appalachian Power* was not afforded the petitioners. The reception of comments after all the crucial decisions have been made is not the same as permitting active and well prepared criticism to become a part of the decision-making process.

We are, therefore, of opinion that the regulation is invalid as a result of the lack of notice required by *Appalachian Power*, and failure to comply with the notice and publication requirements of the Ad-

ministrative Procedure Act, 5 USC § 553(b)(3), and the statute itself, 42 USC § 1857c-5(c)(1). We emphasize again, as we did in Appalachian Power, that, in light of the "drastic impact" which compliance with regulations such as this will have, adherence to applicable statutory provisions is necessary.

III

Management of Parking Supply 40 CFR § 52.1111

Given the fact that the EPA has indefinitely suspended 40 CFR § 52.1111, while at the same time taking the position that such suspension entitles one aggrieved to a new right of review upon reinstatement, we do not feel that the issues raised by the petitioners should be considered at this time. When, and if, the EPA reimposes the provisions of this regulation, the parties will have ample opportunity to present their objections to its implementation. Accord *County of Contra Costa* v. *EPA*, —— F2d —— (9th Cir. 1975). In declining to rule on the regulation involved, we in no way imply that we would not follow the holding in *South Terminal* with respect to a similar interference clause there deemed to be standardless.

IV

Control and Prohibition of Sources of Photochemically Reactive Organic Materials, 40 CFR § 52.1112

The EPA concluded that 40 CFR § 52.1112 regulating sources of photochemically reactive organic

materials was vague and, on January 31, 1975, rescinded it. 40 Fed. Reg. 5523 (January 31, 1975). Thus, this regulation is no longer part of the Maryland plan and will not be considered at this time.

V

Control of Evaporation Losses from Vehicular Tanks, 40 CFR § 52.1102

40 CFR § 52.1102 was designed to prevent the discharge into the atmosphere of gasoline vapors from the nozzles used in filling automobile gasoline tanks. It was also intended to provide for the recovery of at least 90% of the organic compounds displaced from such tanks upon filling, and to prevent overfills and spillage arising therefrom.

On June 18, 1974, the EPA relaxed the compliance schedules and reopened the comment period due to the "substantial confusion" which had "arisen as to the type of equipment and necessary recovery efficiency required to comply." 39 Fed. Reg. 21049-53, esp. 31051.

In so doing, the Agency noted that:

> "[t]he Administrator has concluded that there have been sufficient developments since the regulations were drafted, and that there is sufficient uncertainty about which system will be approvable as to be in compliance with these regulations to warrant a reopening of the opportunity for public comment on this issue until July 31, 1974. In addition, an EPA-funded testing program is being carried out in San Diego County

to attempt to measure the performance of various systems with results expected by August 1, 1974." Id. at 21051.

We have not been advised of the results of the testing program, and, so far as we are informed, neither have the parties. It may be that the Administrator will soon be able to advise what devices are approved and end the uncertainty. The court has had an indication that such may be the case in the allied cases of *Texaco, Inc.* v. *EPA*, No. 74-1011, and *Gulf Oil Corp.* v. *EPA*, No. 74-1052, which were severed from these cases and action deferred.

The EPA takes the position that a requested stay filed by Bethlehem Steel, one of the numerous private parties herein, is premature because no application has been made to the Agency. See Fed. R. App. P. 18. While this position may have some merit, a literal application of Rule 18 of the Federal Rules of Appellate Procedure during the pendency of a review and in the midst of changing regulations would seem of doubtful value. Nevertheless, we decline to grant a stay of the regulation.

We are thus faced with the problem of the proper course to take. If the Administrator does not know what device will be approved, it is obvious that neither the court nor the petitioners do. The compliance schedule dates were extended so that the last construction date fell on May 1, 1975. 39 Fed. Reg. 21051. Hopefully, the technical data is available and has been distributed so this aspect of the case may be dismissed as moot. If it has not, the petitioners may

begin anew for all practical purposes if they feel harmed.

We, therefore, are of opinion to remand this regulation to the EPA for such further consideration as may be appropriate. It may be the EPA will simply reimpose the regulation. If such should be the case, all objections available now or later may be made at that time, including requests for stays and reinstatement of this matter on the docket.

All matters relating to 40 CFR § 52.1102 will be consolidated with those of the *Texaco* and *Gulf* cases, Nos. 74-1011 and 74-1052, and jurisdiction of the matter retained. We feel certain the parties will advise us should a need for our further action be required.

VI

Claims of the State of Maryland

As mentioned before, Maryland submitted its plan to the Administrator, who approved parts of it and disapproved parts of it. For the purposes of our discussion, we consider only the inspection and maintenance program, 40 CFR § 52.1095; vacuum spark advance disconnect retrofit of pre-1968 light duty vehicles, 40 CFR § 52.1096; air/fuel control retrofit of certain 1968-71 light duty vehicles, 40 CFR § 52.-1098, certain pre-1974 medium duty vehicles, 40 CFR § 52.1099, heavy duty vehicles, 40 CFR § 52.1100; and the establishment of bikeways, 40 CFR § 52.1106.

While certain parts of Maryland's Transportation Plan were accepted, some were rejected by the EPA

because, among various reasons, the "legal authority" was not submitted in the plan. The EPA then required Maryland to "establish" an inspection and maintenance program, § 52.1095, various retrofit programs, §§ 52.1096-1100, and a system of bikeways and parking facilities, § 52.1106. The regulations concerning inspection and maintenance, retrofit and bikeway programs all required Maryland to submit "legally adopted regulations" which established or implemented the programs as promulgated by the EPA. The inspection and maintenance regulations required Maryland to submit "the text of needed statutory proposals and regulations that it will propose for adoption" as well as the "text of needed legislation" for funding (if not otherwise available. The retrofit program regulations required Maryland to forward to the Administrator "the text of statutory proposals, regulations, and enforcement procedures" that it submits for adoption.

The complications inherent in these astonishing regulations are compounded by 42 USC § 1857h-5(b)(2) which provides that such actions of the administrator "with respect to which review could have been obtained . . . [as it is here] shall not be subject to judicial review in civil or criminal proceedings for enforcement."

In a nutshell, the EPA has directed Maryland and her legislature to legislate under pain of civil and criminal penalties, 42 USC § 1857c-8, for a State is a person within the meaning of the statute. 42 USC § 1857h(e). The government does not beg the issue,

but boldly takes the position just set forth in its brief as it describes the questioned regulations: "these EPA regulations which require the State to enact enabling legislation. . . ." It then argues that it is immaterial whether the activity regulated under the commerce clause is proprietary or governmental, see *New York* v. *United States*, 326 US 572, 583 (1946), and *United States* v. *California*, 297 US 175, 183 (1936), and that a construction of the commerce clause which does not include the power of the United States to direct the legislature of a state to legislate is "narrow and restrictive."

The EPA takes the position that "direct federal action" to enforce its own regulations, similar to these, would be "inefficient and impractical" and that "[i]t is clearly necessary that implementation and transportation control plans be carried out at the State and local level." 38 Fed. Reg. 30633 (November 6, 1973).

But we do not agree with the Agency that the issue presented is not of unusual constitutional significance. Rather, we are of the opinion that it is. The Supreme Court "has always recognized that the power to regulate commerce, though broad indeed, has limits." *Maryland* v. *Wirtz*, 392 US 193, 196 (1968). In *New York* v. *United States*, the Court emphasized that "[u]sual governmental functions . . . are immune from federal taxation in order to preserve the necessary independence of the State." 326 US at 580. It went on to note that "[t]here are of course State activities and State-owned property that partake of uniqueness from the point of view of inter-

governmental relations." Id. at 582. It is doubtless true that the imposition of a burden upon a state by Congress in the exercise of its power under the commerce clause, even though the burden be onerous and unexpected, does not render the federal action invalid. See, e.g., *Maryland* v. *Wirtz*, supra; *New York* v. *United States*, supra; *United States* v. *California*, supra *Parden* v. *Terminal Railway*, 377 US 184 (1964). But it is yet true, as it was at the time of the first great exposition of the breadth of the commerce clause, that "[a]lthough many of the powers, formerly exercised by the states, are transferred to the government of the Union, yet the state governments remain, and constitute the most important part of our system." *Gibbons* v. *Ogden*, 9 Wheat. 1, 197 (1824).[7]

And, while it may be true that some, or even many, of the attributes of state sovereignty have been diminished by the exercise by Congress of the broad rights accorded the nation under the commerce clause, it is equally true that if there is any attribute of sovereignty left to the states it is the right of their legislatures to pass, or not to pass, laws. As the Court stated in *In re: Duncan*, 139 US 449 (1891):

> "By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and

[7] This case rejected an analogy between the taxing power and the commerce power. 9 Wheat. 1, 199.

> pass their own laws in virtue of the legislative power reposed in representative bodies. . . ." 139 US 449, 461.

Not far afield is the rejection by the Philadelphia Convention of Charles Pinkney's constitutional plan which would have enabled Congress to "revise," "negative," or "annul" the laws of a state. See *Elliot's Debates* (Michie Ed., Vol. I, Book I, pp. 149, 400-01).

If the national legislature may not revise, negative or annul a law of a state legislature, how an Act of Congress may be construed to permit an agency of the United States to direct a state legislature to legislate is difficult to understand.

We have found no appellate case save one, *Pennsylvania* v. *EPA*, 500 F2d 246 (3rd Cir. 1974), which may be construed as holding that the nation may direct the legislature of a state to act, for it is one thing to strike down a state law under the supremacy clause, or to decide that a state which chooses to engage in activities which Congress has a right to control must do so on Congress' terms, or to hold that Congress may induce a state to act by offering favors or exacting financial penalties if it does not, but it is quite another thing to extract from a state a most fundamental attribute of its soverignty. " 'The Court has ample power to prevent what appellants purport to fear, the utter destruction of the State as a sovereign political entity.' " *Maryland* v. *Wirtz*, at p. 196.

We, therefore, do not consider the problem routine, or one which we should meet directly absent the most

compelling circumstances. With the Fifth Circuit, we are of opinion the question is weighty. *Texas* v. *EPA*, 499 F2d 289, 320 (5th Cir. 1974). We are, of course, aware that in *Pennsylvania* v. *EPA*, 500 F2d 246 (3rd Cir. 1974), that court approved an EPA imposed plan with many of the features here claimed objectionable. But it is also true that the First Circuit in *National Resources Defense Fund* v. *EPA*, 478 F2d 875 (1st Cir. 1973), described as "difficult to imagine. . . [t]he sort of guarantee the current Rhode Island executive or legislature could give the EPA to insure that adequate resources would be devoted to the Plan." Id. at 883-84. This was so "given the mechanics of state-federal relations," id at 883, and its opinion that while "[s]uch assurances might have a symbolic effect; they would have little more, since a governor or even a present session of the legislature cannot make binding commitments on behalf of their successors, nor would such representations seem to be enforceable." Id. at 884.

Of equal significance is the recent decision of the Ninth Circuit in *Brown* v. *EPA*, No. 73-3306, —— F2d —— (9th Cir. 1975). There, the court was faced with similar EPA regulations directing the State of California to take certain affirmative actions to insure the attainment of ambient air quality standard. It, too, was of the opinion that in enacting the Clean Air Act, Congress did not intend "to make the states departments of the Environmental Protection Agency, no less obligated to obey its Administrator's command than. . . its subordinates." Slip opinion, p. 21. Thus, it interpreted the Act accordingly.

While not reaching the constitutional issues raised by the EPA's claimed authority, the court, nevertheless, felt compelled to suggest its general evaluation of these issues so as to "reveal the intensity of [their] desire to avoid them." Slip opinion, p. 18. In so doing, the court noted that acceptance of the broad interpretation of the Commerce Clause which the EPA urged was appropriate "would reduce the states to puppets of a ventriloquist Congress." Id. at 22. The court refused to attribute to Congress any such purpose unless it was expressed unequivocally. This, in its view, was not done in the Clean Air Act.

And, also in point is our language in *Appalachian Power Co.* v. *EPA*, 477 F2d 495 (4th Cir. 1973), where, in discussing the rejection of a state plan by the EPA under this statute, we said:

> "[I]f . . . [the Administrator] finds it [the plan] reasonably unlikely to achieve such results within fixed time-tables, whether for technological or economic reasons, or otherwise, he should reject the plan and return it to the state authorities with instructions to consider alternative procedures that might meet the statutory requirements as established by the Administrator." 477 F2d 495, 506.

So, far from believing the regulations are plainly valid, we are of opinion their constitutional validity is very doubtful at the very best, and refrain from ruling on their validity only because of two canons of construction which, in the exercise of proper restraint and constitutional limitations, courts should use in construing an Act of Congress. The first of

these is that given a valid and invalid construction, courts should, when possible, construe the statute as valid. *Graham* v. *Richardson*, 403 US 365, 383 (1971). The second is that if a case can be decided on either of two grounds, one involving a constitutional question, and the other, a question of statutory construction or general law, the court should decide on the basis of the latter. *Ashwander* v. *TVA*, 297 US 288, 347 (1936) (Justice Brandeis concurring); *Alma Motor Co.* v. *Timken Co.*, 329 US 129, 136 (1946).

The statute itself in pertinent part provides that a state shall "submit . . . a plan" to comply with the statutory mandate (and achieve the goals set out therein), 42 USC § 1857c-5(a)(1), and the Administrator shall "approve or disapprove such plan," 42 USC § 1857c-5(a)(2). To merit approval, the plan must contain the "necessary assurances that the State will have . . . authority to carry out such implementation plan." 42 USC § 1857c-5(a)(2)(f). If an implementation plan submitted by a state is "determined by the Administrator not to be in accordance with the requirements of the statute, the Administrator "shall . . . promptly prepare and publish proposed regulations setting forth an implementation plan, or a portion thereof, for a State." 42 USC § 1857c-5(a)(1)(B). As is seen from the table appended hereto, part of the Maryland plan was approved and part was disapproved. So far as we are presently concerned, such disapproval was based on a lack of authority.

Instead of referring the matter back to the state to "consider alternative procedures that might meet the statutory requirements," *Appalachian Power* at 506, the EPA imposed its own plan for Maryland. Assuming the EPA has the right to impose such a plan on Maryland under 42 USC § 1857c-5(c)(1), having once found Maryland's proposal lacking in authority, we find nothing in the statute which authorizes the Administrator to direct the state to supply "legal authority," or "statutory proposals" or the like for the "assurances" offered to the Administrator. The statute in plain words authorizes the Administrator to "prepare . . . regulations . . . for a State;" it does not empower him to direct a state to enact its own statutes and regulations as prescribed by the Administrator. In our opinion, the preparation of regulations for a state means regulations to be applied within the boundaries of a state if it does not act in a manner approved by the EPA. The fact that the EPA may prepare regulations for a state "to consider", *Appalachian Power* at 506, implies no authority to order Maryland to legislate, "submit legally adopted regulations," etc.

The EPA argues that federal administration of the federal law will be "inefficient and impractical", and that the same may be better administered by the states. Assuming this to be true, and assuming the debates of Congress cited by the Agency support this contention, and accepting the stated intent of the statute that the control of air pollution remains the primary responsibility of the state and local govern-

ments, we still find nothing in any of them which indicates the statute should be construed with such sweeping breadth as the government claims. We are of opinion that constitutional principles may not be violated for administrative expediency, *Thompson* v. *Smith*, 155 Va. 367, 379, 154 S.E. 579 (1930), and the acceptance or rejection of hordes of federal employees enforcing an EPA plan for Maryland, as argued by the EPA, unpalatable as that may be, is a political judgment entrusted by the Constitution to the Maryland General Assembly and the State of Maryland.

We acknowledge that the construction of a statute by the agency administering it is to be accorded great weight. See, e.g., *Social Security Board* v. *Nierotko*, 327 US 358, 368 (1946). But if the acts of the administering agency are not in accorance with law, it actions must be set aside. 5 USC § 706.

It should be noted that many forms of pressure on the states have been held not to violate those rights reserved by the Tenth Amendment, and none of them have been included in this statute. The alternative whip of economic pressure and seductive favor was approved in *Steward Machine Co.* v. *Davis*, 301 US 548 (1937) (unemployment tax); *Oklahoma* v. *Civil Service Comm'n.*, 330 US 127 (1937) (withholding of highway funds conditioned on removal of a member of the highway commission of state); *Vermont* v. *Brinegar*, 379 F.Supp. 606 (D. Vt. 1974) (highway funds withholding for non-compliance with Highway Beautification Act); and many other cases.

Statutes are common which invite state regulation or administration in lieu of federal control, see 49 USC § 1671 et seq, on National Gas Pipeline Safety; or which withhold federal aid for failure to comply with federal standards, see P.L. 92-239, withholding federal approval of highway projects for states which have a speed limit of more than 55 m.p.h.; or making federal grants for state plans invoking federal standards, Occupational Safety and Health Act, 29 USC § 651, et seq. And it should be noted, as did the Fifth Circuit in *Texas* v. *EPA* at 320, that no similar available administrative alternatives have been proposed by the EPA in this case. The EPA has simply construed the statute to suit its administrative convenience with a direction to Maryland to perform, leaving no alternative. Maryland could not, as Oklahoma did in *Oklahoma* v. *Civil Service Comm'n.*, 330 US 127, 143 (1946), "adopt the simple expedient of not yielding." Moreover, the statute itself, 42 USC § 1857-5(b)(2), provides that Maryland must litigate now or forfeit the defense later.

Has Congress abandoned its time honored and constitutionally approved device of threat and promise? We think not. The statute here tells the States to devise implementation plans conforming to federal specifications or else the EPA will promulgate its own plan. The threat is a federally imposed regulation with federal administration; the promise is the invitation for Maryland to enact a suitable implementation plan and administer it with state employees, thus avoiding federal interference. Nothing in the statute presently brought to our attention should

prevent the EPA from, for example, promulgating substantive regulations and inviting Maryland to administer them upon proper "assurances" by Maryland as required by the statute.

But in the promulgation of its own plan, the EPA may not, under the statute, direct Maryland to act in the manner and form prescribed under these regulations. This would be construing the statute to have a breadth Congress never intended. Inviting Maryland to administer the regulations, and compelling her to do so under threat of injunctive and criminal sanctions, are two entirely different propositions. We are thus of the opinion, and so hold, that the EPA was without authority under the statute, as a matter of statutory construction, to require Maryland to establish the programs and furnish legal authority for the administration thereof.

VI

Conclusions

From what has been said, it is apparent that we must decline to approve parts of the EPA plan for Maryland. The State of Maryland asserts without contradition that as a result of the amendment to the statute providing for the clean car, the plan as presently devised will require 56% gasoline rationing by 1977. It requests, therefore, that the entire matter be reconsidered by the Agency. The economic and social consequences of such restrictions on a community of hundreds of thousands are impossible to predict and it would be an understatement to say they will be immense. The EPA apparently does not

especially oppose this approach, although nothing in its brief may be construed as acquiescence. But we must consider that Congress has set deadline dates for attainment of the statutory goals and those parts of the Maryland plan not reviewed are a beginning on a very complex problem.

In view of the advice we have received from the EPA that the Congressional amendment to the clean car program "has a serious impact on the capability of the transportation control plans to attain ambient air quality standards by May 31, 1977," especially when coupled with the fact that catalytic converters may be discharging sulfuric acid emissions into the atmosphere, the EPA may wish to reconsider the entire program for Maryland. This, however, is a matter the Administrator should decide.

We will, then, set out specifically the regulations with respect to which we take action.

40 CFR § 52.1105, employer provisions for mass transit priority incentives, is remanded to the EPA for action not inconsistent with this opinion.

40 CFR § 52.1111, management of parking supply, having been suspended indefinitely, with the right of review reserved, the petitions for review are dismissed from the active docket of this court, without prejudice, and with leave to reinstate the same for good cause shown.

40 CFR § 52.1112, control and prohibition of photochemically reactive organic materials, the regulation having been rescinded, the petitions are dismissed as moot.

40 CFR § 52.1102, control of evaporation losses from vehicular tanks, this regulation is remanded to the Administrator for action not inconsistent with this opinion, although jurisdiction of the matter is retained. For purposes of further action by this court, the petition of *Bethlehem Steel*, in case No. 74-1064, as it may concern 40 CFR § 52.1102, is consolidated with the petitions of *Texaco*, No. 74-1011, and *Gulf*, No. 74-1052.

40 CFR § 52.1097, oxidation catalyst retrofit program for light and medium duty vehicles. Since EPA advises the regulation is being rescinded, the petition is dismissed, as moot, without prejudice to reinstate the same or file another petition should we be mistakenly advised.

40 CFR §§ 52.1095, inspection and maintenance program, 52.1096, vacuum spark advance disconnect retrofit program, 52.1098, light duty air/fuel control retrofit program, 52.1100, heavy duty air/fuel control retrofit program, and 52.1106, study and establishment of bikeways program, are all set aside as contrary to law.

40 CFR § 52.1080, compliance schedule. In the prayer of the petition, Maryland asked for the first time to have this regulation set aside. The regulation covers a multitude of subjects from boilers to bus lanes and no attempt was made to enlighten us as to the specific defects claimed. Accordingly, the petition for review as to § 52.1080 is dismissed without prejudice to reinstate the same for good cause shown.

TABLE 1.—EPA TRANSPORTATION CONTROL PLAN

Maryland plan	EPA proposal	EPA promulgation
	STATIONARY SOURCE CONTROLS	
Service station tank vapor recovery.	Service station tank vapor recovery.	Service station tank vapor recovery.
Service station pump vapor recovery.	Service station pump vapor recovery.	Service station pump vapor recovery.
Control of dry cleaning losses.	Control of dry cleaning losses.	Control of dry cleaning losses.
Limitation of major source emissions.	Control of organic solvents.	Limitation of major source emissions.
Prohibition of new major sources.		
	MOBILE SOURCE CONTROLS	
Inspection-maintenance.	Inspection-maintenance.	Inspection-maintenance.
HDV catalytic retrofit.		HDV air-fuel control retrofit.
	VSAD retrofit, pre-68 LDV.	VSAD retrofit, pre-68 LDV.
	LDV catalytic retrofit.	LDV catalytic retrofit.
		LDV air-fuel control retrofit.
		MDV catalytic retrofit.
		MDV air-fuel control retrofit.
	VMT CONTROLS	
Transit service improvements.		
Carpool locator.		Carpool locator.
Express busways.	Exclusive buslanes.	Exclusive busways.
	Limitation of onstreet parking.	Limitation of onstreet parking.
Traffic flow improvements.		Traffic flow improvements.
Episode vehicle exclusion.		Management of parking supply.
		Employer's parking policy.
		Study and establishment of bikeways.
	Gasoline distribution limitation.	Gasoline distribution limitation.

TABLE 2—COMPILATION OF CONTROL STRATEGY EFFECTS FOR THE METROPOLITAN BALTIMORE INTRASTATE AIR QUALITY CONTROL REGION ON MAY 31, 1977

	Carbon monoxide		Hydrocarbons	
	Tons per year	Percent of base year	Tons per peak period	Percent of base year
1972 ton per year (base year)	592,737	100.0	61.0	100.0
Reduction required to reach NAAQS	337,860	57.0	42.7	70.0
STATIONARY SOURCES				
Emissions without control strategy	103,300	17.4	13.5	22.1
Expected reduction from existing regulations				
(a) Solvent control			0.85	1.4
(b) Gasoline handling vapor recovery (bulk)			1.0	1.6
(c) Drycleaning emissions control			0.39	0.6
(d) Aircraft ground operations			—0.18	—0.3
(e) Net result of industrial growth	—5,575	—0.9	—0.17	—0.3
Promulgated stationary source controls:				
(a) Control and prohibition of major sources			0.52	0.9
(b) Gasoline handling vapor recovery (stage I)			0.57	0.9
(c) Gasoline handling vapor recovery (stage II)			0.95	1.6
Stationary source emissions remaining	108,875	18.4	9.57	15.7
MOBILE SOURCES				
Emissions from LDV's, MDV's, and HDV's without control strategy	489,437	82.6	47.5	77.9
Expected reductions:				
(a) Federal motor vehicle control program*	156,437	26.4	18.7	30.7
(b) Inspection and maintenance (LDV, MDV)	23,710	4.0	2.23	3.7
(c) VSAD retrofit, pre-1968 LDV's	1,656	0.3	0.29	0.5
(d) Air-fuel retrofit, 1968-1971 LDV's	26,491	4.5	0.80	1.3
(e) Catalytic retrofit, 1971-1975 LDV, MDV	58,681	9.9	3.38	5.5
(f) Air-fuel retrofit, pre-1974 MDV's	2,916	0.5	0.22	0.4
(g) Air-fuel retrofit, HDV's	26,512	4.5	1.38	2.3
(h) Traffic flow improvements	3,065	0.5	2.61	4.3
(i) VMT measures: Exclusive buslanes, carpool locator, bikeway program, parking restrictions	2,734	0.5	0.43	0.7
(j) Gasoline distribution limitation	78,381	13.2	8.73	14.3
Mobile source emissions remaining	108,854	18.4	8.73	14.3
Total reductions	375,008	63.3	42.7	70.0
Total emissions remaining	217,729	36.7	18.3	30.0
Total allowable emissions	254,877	43.0	18.3	30.0

* Includes effect of VMT growth.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 74-1007

STATE OF MARYLAND, PETITIONER

versus

RUSSELL E. TRAIN, Administrator, and Environmental Protection Agency, RESPONDENT

DISTRICT OF COLUMBIA, a municipal Corp., INTERVENOR

WASHINGTON AREA BICYCLIST ASSOC., INC., ET AL., INTERVENOR

ON PETITION FOR REVIEW OF AN ORDER OF THE ENVIRONMENTAL PROTECTION AGENCY

THIS CAUSE CAME ON to be heard upon the petition of the State of Maryland for review of Environmental Protection Agency Regulations, Employer's Provision for Mass Transit Priority Incentives—40 CFR § 52.1105; Management of Parking Supply—40 CFR § 52.1111; Control and Prohibition of Sources of Photochemically Reactive Organic Materials—40 CFR § 52.1112; and Control of Evaporative Losses from Vehicular Tanks—40 CFR § 52.1102; and upon a certified list in lieu of a transcript of the record; and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that:

40 CFR § 52.1105, employer provisions for mass transit priority incentives, is remanded to the EPA for action not inconsistent with the opinions of this Court.

40 CFR § 52.1111, management of parking supply, having been suspended indefinitely, with the right of review reserved, the petition for review is dismissed from the active docket of this court, without prejudice, and with leave to reinstate the same for good cause shown.

40 CFR § 52.1112, control and prohibition of photochemically reactive organic materials, the regulation having been rescinded, the petition is dismissed as moot.

40 CFR § 52.1102, control of evaporation losses from vehicular tanks, this regulation is remanded to the Administrator for action not inconsistent with this opinion, although jurisdiction of the matter is retained. For purposes of further action by this court, the petition of *Bethlehem Steel*, in case No. 74-1064, as it may concern 40 CFR § 52.1102, is consolidated with the petitions of *Texaco*, No. 74-1011, and *Gulf*, No. 74-1052.

40 CFR § 52.1097, oxidation catalyst retrofit program for light and medium duty vehicles. Since EPA advises the regulation is being rescinded, the petition is dismissed as moot, without prejudice to reinstate the same or file another petition should we be mistakenly advised.

40 CFR §§ 52.1095, inspection and maintenance program, 52.1096, vacuum spark advance disconnect retrofit program, 52.1098, light duty air/fuel control

retrofit program, 52.1100, heavy duty air/fuel control retrofit program, and 52.1106, study and establishment of bikeways program, are all set aside as contrary to law.

40 CFR § 52.1080, compliance schedule. In the prayer of the petition, Maryland asked for the first time to have this regulation set aside. The regulation covers a multitude of subjects from boilers to bus lanes and no attempt was made to enlighten the court as to the specific defects claimed. Accordingly, the petition for review as to § 52.1080 is dismissed without prejudice to reinstate the same for good cause shown.

/s/ WILLIAM K. SLATE, II
Clerk

[Filed Sep. 19, 1975, William K. Slate, II, Clerk]

A True Copy, Teste:

William K. Slate, II, Clerk
By /s/ [Illegible]
Deputy Clerk

APPENDIX C

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

I. The Constitution of the United States provides in pertinent part:

Article I, Section 8:

> The Congress shall have Power * * *
>
> * * * * *
>
> To regulate Commerce * * * among the several States * * *
>
> * * * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article VI:

> * * * * *
>
> This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land * * *.

Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

II. Sections 101, 107, 109, 110, 113 and 302(e) of the Clean Air Act of 1967, 81 Stat. 485, as amended

by the Clean Air Act Amendments of 1970, 84 Stat. 1676, 42 U.S.C. 1857 *et seq.*, as amended by Section 302, 85 Stat. 464 and Section 4 of the Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, 88 Stat. 256, provide in relevant part:

Section 101 (42 U.S.C. 1857)

Congressional findings; purposes of subchapter.

(a) The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(b) The purposes of this subchapter are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public

health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution control programs.

Section 107 (42 U.S.C. 1857c-2)

Air quality control regions.

(a) Responsibility of State for air quality; submission of implementation plan.

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

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Section 109 (42 U.S.C. 1857c-4)

National primary and secondary ambient air quality standards; promulgation; procedure.

(a)(1) The Administrator—

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard

and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31, 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b)(1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this sec-

tion shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

Section 110 (42 U.S.C. 1857c-5)

State implementation plans for national primary and secondary ambient air quality standards.

(a)(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 109 for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan

implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan for each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A)(i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and, (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan; (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources; (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this Act, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 303, and adequate contingency plans to implement such authority;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

(H) it provides for revision, after public hearings, of such plan (i) from time to time as

may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

(3)(A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this Act and the Energy Supply and Environmental Coordination Act of 1974, review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the re-

vision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(4) The procedure referred to in paragraph (2)(D) for review, prior to construction or modification, of the location of new sources shall (A) provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance under section 111 will apply at any location which the State determines will prevent the attainment or maintenance within any air quality control region (or portion thereof) within such State of a national ambient air quality primary or secondary standard, and (B) require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit to such State such information as may be necessary to permit the State to make a determination under clause (A).

(b) The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

(c)(1) The Administrator shall, after consideration of any State hearing record, promptly prepare

and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(A) The State fails to submit an implementation plan for any national ambient air quality primary or secondary standard within the time prescribed,

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a)(2)(H).

If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section.

(2)(A) The Administrator shall conduct a study and shall submit a report to the Committee on Interstate and Foreign Commerce of the United States House of Representatives and the Committee on Public Works of the United States Senate not later than

three months after date of enactment of this paragraph on the necessity of parking surcharge, management of parking supply, and preferential bus/carpool lane regulations as part of the applicable implementation plans required under this section to achieve and maintain national primary ambient air quality standards. The study shall include an assessment of the economic impact of such regulations, consideration of alternative means of reducing total vehicle miles traveled, and an assessment of the impact of such regulations on other Federal and State programs dealing with energy or transportation. In the course of such study, the Administrator shall consult with other Federal officials including, but not limited to, the Secretary of Transportation, the Federal Energy Administrator, and the Chairman of the Council on Environmental Quality.

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void upon the date of enactment of this subparagraph. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) The Administrator is authorized to suspend

until January 1, 1975, the effective date or applicability of any regulations for the management of parking supply or any requirement that such regulations be a part of an applicable implementation plan approved or promulgated under this section. The exercise of the authority under this subparagraph shall not prevent the Administrator from approving such regulations if they are adopted and submitted by a State as part of an applicable implementation plan. If the Administrator exercises the authority under this subparagraph, regulations requiring a review or analysis of the impact of proposed parking facilities before construction which take effect on or after January 1, 1975, shall not apply to parking facilities on which construction has been initiated before January 1, 1975.

(D) For purposes of this paragraph—

(i) The term 'parking surcharge regulation' means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term 'management of parking supply' shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term 'preferential bus/carpool lane' shall include any requirement for the setting aside of one or more lanes of a street or highway on a

permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after the date of enactment of this paragraph by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

(d) For purposes of this Act, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under subsection (a) or promulgated under subsection (c) and which implements a national primary or secondary ambient air quality standard in a State.

(e)(1) Upon application of a Governor of a State at the time of submission of any plan implementing a national ambient air quality primary standard, the Administrator may (subject to paragraph (2)) extend the three-year period referred to in subsection (a)(2)(A)(i) for not more than two years for an air quality control region if after review of such plan the Administrator determines that—

(A) one or more emission sources (or classes of moving sources) are unable to comply with the requirements of such plan which implement

such primary standard because the necessary technology or other alternatives are not available or will not be available soon enough to permit compliance within such three-year period, and

(B) the State has considered and applied as a part of its plan reasonably available alternative means of attaining such primary standard and has justifiably concluded that attainment of such primary standard within the three years cannot be achieved.

(2) The Administrator may grant an extension under paragraph (1) only if he determines that the State plan provides for—

(A) application of the requirements of the plan which implement such primary standard to all emission sources in such region other than the sources (or classes) described in paragraph (1)(A) within the three-year period, and

(B) such interim measures of control of the sources (or classes) described in paragraph (1)(A) as the Administrator determines to be reasonable under the circumstances.

(f)(1) Prior to the date on which any stationary source or class of moving sources is required to comply with any requirement of an applicable implementation plan the Governor of the State to which such plan applies may apply to the Administrator to postpone the applicability of such requirement to such source (or class) for not more than one year. If the Administrator determines that—

(A) good faith efforts have been made to comply with such requirement before such date,

(B) such source (or class) is unable to comply with such requirement because the necessary technology or other alternative methods of control are not available or have not been available for a sufficient period of time,

(C) any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health, and

(D) the continued operation of such source is essential to national security or to the public health or welfare,

then the Administrator shall grant a postponement of such requirement.

(2)(A) Any determination under paragraph (1) shall (i) be made on the record after notice to interested persons and opportunity for hearing, (ii) be based upon a fair evaluation of the entire record at such hearing, and (iii) include a statement setting forth in detail the findings and conclusions upon which the determination is based.

(B) Any determination made pursuant to this paragraph shall be subject to judicial review by the United States court of appeals for the circuit which includes such State upon the filing in such court within 30 days from the date of such decision of a petition by any interested person praying that the decision be modified or set aside in whole or in part. A copy of the petition shall forthwith be sent by registered or certified mail to the Administrator and thereupon the Administrator shall certify and file in such court the record upon which the final decision

complained of was issued, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition the court shall have jurisdiction to affirm or set aside the determination complained of in whole or in part. The findings of the Administrator with respect to questions of fact (including each determination made under subparagraphs (A), (B), (C), and (D), of paragraph (1)) shall be sustained if based upon a fair evaluation of the entire record at such hearing.

(C) Proceedings before the court under this paragraph shall take precedence over all the other causes of action on the docket and shall be assigned for hearing and decision at the earliest practicable date and expedited in every way.

(D) Section 307 (a) (relating to subpenas) shall be applicable to any proceeding under this subsection.

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Section 113 (42 U.S.C. 1857c-8)

Federal enforcement procedures.

(a)(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or

he may bring a civil action in accordance with subsection (b).

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of an applicable implementation plan are so widespread that such violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the 30th day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan (hereafter referred to in this section as 'period of Federally assumed enforcement'), the Administrator may enforce any requirement of such plan with respect to any person—

(A) by issuing an order to comply with such requirement, or

(B) by bringing a civil action under subsection (b).

(3) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of section 111(e) (relating to new source performance standards), 112(c) (relating to standards for hazardous emissions), or 119 (g) (relating to energy-related authorities), or is in violation of any requirement of section 114 (relating to inspections, etc.), he may issue an order requiring such person to comply with such section or re-

quirement, or he may bring a civil action in accordance with subsection (b).

(4) An order issued under this subsection (other than an order relating to a violation of section 112) shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation. A copy of any order issued under this subsection shall be sent to the State air pollution control agency of any State in which the violation occurs. Any order issued under this subsection shall state with reasonable specificity the nature of the violation, specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection (or notice to a violator under paragraph (1)) is issued to a corporation, a copy of such order (or notice) shall be issued to appropriate corporate officers.

(b) The Administrator may commence a civil action for appropriate relief, including a permanent or temporary injunction, whenever any person—

(1) violates or fails or refuses to comply with any order issued under subsection (a); or

(2) violates any requirement of an applicable implementation plan (A) during any period of Federally assumed enforcement, or (B) more than 30 days after having been notified by the Administrator under subsection (a)(1) of

a finding that such person is violating such requirement; or

(3) violates section 111(e), 112(c), or 119(g); or

(4) fails or refuses to comply with any requirement of section 114.

Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given to the appropriate State air pollution control agency.

(c)(1) Any person who knowingly—

(A) violates any requirement of an applicable implementation plan (i) during any period of Federally assumed enforcement, or (ii) more than 30 days after having been notified by the Administrator under subsection (a)(1) that such person is violating such requirement, or

(B) violates or fails or refuses to comply with any order issued by the Administrator under subsection (a), or

(C) violates section 111(e), section 112(c), or section 119(g) shall be punished by a fine of not more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after the first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of viola-

tion, or by imprisonment for not more than two years, or by both.

(2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this Act or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this Act, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

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Section 302 (42 U.S.C. 1857h)

Definitions.

When used in this chapter—

(a) The term "Administrator" means the Administrator of the Environmental Protection Agency.

* * * * *

(d) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

(e) The term "person" includes an individual, corporation, partnership, association, State, municipality, and political subdivision of a State.

(f) The term "municipality" means a city, town, borough, county, parish, district, or other public body created by or pursuant to State law.

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(h) All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being.

III. 40 C.F.R. Part 52 provides in pertinent part:

§ 52.23 (as amended Sept. 18, 1974, 39 Fed. Reg. 33512)

Violation and Enforcement.

Failure to comply with any provisions of this part, or with any approved regulatory provision of a state implementation plan, or with any permit condition or permit denial issued pursuant to approved or promulgated regulations for the review of new or modified stationary or indirect sources, shall render the person or governmental entity so failing to comply in violation of a requirement of an applicable implementation plan and subject to enforcement action under section 113 of the Clean Air Act. With regard to compliance schedules, a person or Governmental entity will be considered to have failed to comply with the requirements of this part if it fails to timely submit any required compliance schedule, if the compliance schedule when submitted does not contain each of the elements it is required

to contain, or if the person or Governmental entity fails to comply with such schedule.

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Subpart V—Maryland

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§ 52.1095 Inspection and maintenance program.

(a) Definitions:

(1) "Inspection and maintenance program" means a program for reducing emissions from in-use vehicles through identifying vehicles that need emission control-related maintenance and requiring that such maintenance be performed.

(2) "Light-duty vehicle" means a gasoline-powered motor vehicle rated at 6,000 lb gross vehicle weight (GVW) or less.

(3) "Medium-duty vehicle" means a gasoline-powered motor vehicle rated at more than 6,000 lb GVW and less than 10,000 lb GVW.

(4) "Heavy-duty vehicle" means a gasoline-powered motor vehicle rated at 10,000 GVW or more.

(5) All other terms used in this section that are defined in Part 51, Appendix N, of this chapter are used herein with the meanings so defined.

(b) This section is applicable within the Metropolitan Baltimore Intrastate AQCR.

(c) The State of Maryland shall establish an inspection and maintenance program applicable to all light-duty, medium-duty, and heavy-duty vehicles registered in the area specified in paragraph (b) of this section that operate on public streets or highways over which it has ownership or control. The State may exempt any class or category of vehicles that the State finds is

rarely used on public streets or highways (such as classic or antique vehicles). No later than April 1, 1974, the State shall submit legally adopted regulations to the Administrator establishing such a program. The regulations shall include:

(1) Provisions for inspection of all light-duty, medium-duty, and heavy-duty motor vehicles at periodic intervals no more than 1 year apart by means of a loaded emission test.

(2) Provisions for inspection failure criteria consistent with the failure of 30 percent of the vehicles in the first inspection cycle.

(3) Provisions to ensure that failed vehicles receive within two weeks, the maintenance necessary to achieve compliance with the inspection standards. These shall include sanctions against individual owners and repair facilities, retest of failed vehicles following maintenance, use of a certification program to ensure that repair facilities performing the required maintenance have the necessary equipment, parts, and knowledgeable operators to perform the tasks satisfactorily, and use of such other measures as may be necessary or appropriate.

(4) A program of enforcement to ensure that vehicles are not intentionally readjusted or modified subsequent to the inspection and/or maintenance in such a way as would cause them to no longer comply with the inspection standards. This enforcement program might include spot checks of idle adjustments and/or a suitable type of physical tagging. This program shall include appropriate penalties for violation.

(5) Provisions for beginning the first inspection cycle by August 1, 1975, and completing it by July 31, 1976.

(6) Designation of an agency or agencies responsible for conducting, overseeing, and enforcing the inspection and maintenance program.

(d) After July 31, 1976, the State shall not register or allow to operate on public streets or highways any light-duty, medium-duty, or heavy-duty vehicle that does not comply with the applicable standards and procedures adopted pursuant to paragraph (c) of this section. This shall not apply to the initial registration of a new motor vehicle.

(e) After July 31, 1976, no owner of a light-duty, medium-duty, or heavy-duty vehicle shall operate or allow the operation of such vehicle that does not comply with the applicable standards and procedures adopted pursuant to paragraph (c) of this section. This shall not apply to the initial registration of a new motor vehicle.

(f) The State of Maryland shall submit no later than February 1, 1974, a detailed compliance schedule showing the steps it will take to establish and enforce an inspection and maintenance program pursuant to paragraph (c) of this section, including:

(1) The text of needed statutory proposals and regulations that it will propose for adoption.

(2) The date by which the State will recommend needed legislation to the State legislature.

(3) The date by which necessary equipment will be ordered.

(4) A signed statement from the Governor or his designee identifying the sources and amounts of funds for the program. If funds cannot legally be obligated under existing statutory authority, the text of needed legislation shall be submitted.

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